No. 82-1795

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

vs.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL C. TURPEN
Attorney General of Oklahoma

JAMES B. FRANKS *
Assistant Attorney General
Deputy Chief, Civil Division

LYNN BARNETT
Assistant Attorney General

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Attorneys for Respondent

* Counsel of Record

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QUESTION PRESENTED

May the State of Oklahoma, in pursuit of its policy of promoting temperance, prevent cable television operators from distributing within the State advertisements which promote the increased consumption of intoxicating liquor products?

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (Cont.)

Administrative Decisions and Reports

TABLE OF AUTHORITIES (Cont.)

Constitutional Provisions

Statutory Provisions

Regulations

Court Rules

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STATEMENT OF THE CASE

In 1959, Oklahomans voted to repeal prohibition, but provided constitutional and statutory safeguards for the strict regulation of the State's new liquor industry. Respondent herein is the Director of the agency charged with the enforcement of those laws regarding all aspects of the sale and distribution of alcoholic beverages. Subsequent to the referendum and the enactment of constitutional and statutory provisions specifically denying the right to advertise liquor, including wine, Respondent has prohibited, within its means, all forms of liquor advertising from all sources, both interstate

and intrastate. At the present time, the only advertising allowed includes certain limited signs within retail package store premises and one sign identifying retail package stores. Because of the difficulty of enforcement with regard to liquor ads included out-of-state print publications, the Board has not been able to pursue prosecution of those violations.

The constitutional and statutory provisions concerned here are:

Okla. Const. Art. 27, § 5, in pertinent part

"It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'"

37 O.S.1981, § 516

"It shall be unlawful for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store,' or any combination of such words or any of them and no letter in any such sign shall be more than four (4) inches in height or more than three (3) inches in

width, and if more than one (1) line is used the lines shall not be more than one (1) inch apart."

The Petitioners are cable service operators whose systems enable Oklahomans to receive out-of-state television programming. Such cable programming has included wine advertisements in violation of Oklahoma law. Most programming containing such ads is carried as a result of discretionary choices by Petitioners themselves and not as a result of Federal Communications Commission's (FCC) prohibition of commercial deletions or "must-carry" rules (Petition for Writ, p. 3). Petitioners also indicate that most of their concerns are primarily matters of convenience and cost (Writ for Certiorari, pp. 19 and 20, footnote 39).

District Court Proceedings

Following Respondent's confirmation that 37 O.S. 1981, § 516 would be enforced as to cable operators, Petitioners filed an action asking for a declaratory judgment as to the constitutionality of Oklahoma's liquor advertising ban. A preliminary injunction was then issued in favor of Petitioners and subsequently, summary judgment was entered based upon the trial court's reasoning that such a ban was an infringement of Petitioner's First Amendment rights.

Court of Appeals Decision

On appeal, the Tenth Circuit reversed, holding that the advertising ban did not violate Petitioner's rights even though the advertisements pertained to lawful activity and were not inherently misleading. The Court held as a matter of law that a prohibition on such advertising was reasonably related to reducing the sale and consumption of alcohol and its attendant problems. Okla. Telecasters Assoc., et al. v. Crisp, 699 F.2d 490 (10th Cir. 1983). Relying on Queensgate Investment Co. v. Liquor Control Commission, ___ U.S. ___, 103 S. Ct. 31, 74 L. Ed. 2d 45 (1982), the Court of Appeals further held that to the extent that the same constitutional issues were presented therein, that decision was binding. Okla. Telecasters Assoc., supra.

However, the Court of Appeals also independently applied the four-part commercial speech test established by Central Hudson Gas & Elec. Corp. v. Public Service Commission, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). The Circuit Court thus found the means of regulation chosen by the Legislature to be inherently valid acts under Oklahoma's police power which directly advanced substantial state interests. Finally, the means chosen were held to be no more extensive than necessary. The Court of Appeals emphasized that the proper resolution in cases such as this requires a careful balancing of interests. In so doing,

the Court was not rejecting any particular standard of review, but was describing the analytical process necessary when Courts must choose between conflicting State and federal interests of similar importance.

REASONS FOR DENYING THE WRIT

I. AN EN BANC PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS VACATED THE OPINION OF THE ORIGINAL PANEL IN THE CASES OF LAMAR OUTDOOR ADVERTISING, INC. V. MISSISSIPPI STATE TAX COMMISSION, 701 F.2d 314 (5th Cir. 1983) AND DUNAGIN V. CITY OF OXFORD, MISS., 701 F.2d 335 (5th Cir. 1983), AND, CONSEQUENTLY, THERE EXISTS NO CIRCUIT COURT OF APPEALS DECISION WHICH IS IN CONFLICT WITH THE OPINION OF THE TENTH CIRCUIT COURT OF APPEALS IN THIS CASE.

The Petitioners contend that the decision of the Tenth Circuit Court of Appeals, below, is in conflict with that of the Fifth Circuit Court of Appeals in the cases of Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission, supra, and Dunagin v. City of Oxford, Miss., supra. However, the Fifth Circuit has ordered that both of these cases be reheard en banc.

Lamar, supra, 701 F.2d at 335; Dunagin, supra, 701 F.2d at 336 (5th Cir. 1983).

Under the rules of the Fifth Circuit in this situation, "the effect of granting a rehearing en banc is to vacate the panel opinion and judgment of the Court and stay the mandate." U.S. Ct. of App., 5th Cir., Rule 17. This fact is conceded by the Petitioners in their Petition for a Writ of Certiorari, p. 18, n. 34. It follows that the conflict between the Circuits of which the Petitioners complain simply does not presently exist.

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION FOR CONSIDERATION BY THIS COURT.

One of the criteria for assumption of jurisdiction by this Court on a Writ of Certiorari is the existence of a substantial federal question. See, Miller v. California, 418 U.S. 915, 94 S. Ct. 3206, 41 L. Ed. 2d 1158 (1974) (Douglass, J., dissenting). Such a question is not presented by the case at bar.

With the repeal of the Eighteenth Amendment to the United States Constitution in 1933, the national prohibition of alcoholic beverages was eliminated. In its stead, the Twenty-First Amendment allowed regulation by State of the transportation or importation of such beverages within its borders. Until 1959, Oklahoma countinued its blanket prohibition of alcohol.

Passage of State Question No. 386 in that year indicated the people's reaffirmation of the desirability restrictive regulations of all aspects of the sale and distribution of liquor, including advertising.

Oklahoma has accepted its responsibility under the Twenty-First Amendment to protect the health and welfare of its citizenry from the problems associated with the use of intoxicating liquor. Inherent in that police power is the authority to regulate such substances which are highly capable of or subject to abuse. Such regulations, to be effective, must to some degree affect other personal and public, interstate and intrastate rights and privileges.

Petitioners herein intercept and deliver television programming into the State of Oklahoma. In so doing, they have occasion to transmit commercial messages about a myriad of subjects, including the sale and consumption of alcoholic beverages. Petitioners urge that because they are unable to transmit such advertising without limitation into Oklahoma, a significant and substantial constitutional infringement has occurred.

The more correct characterization would be that the Petitioners are only incidentally and nominally affected by Oklahoma's ban on liquor advertising. Petitioners herein are not prohibited from transmitting all other types of programming into Oklahoma, including all other commercial messages. They remain virtually

unaffected in their general exercise of any alleged commercial speech rights.

Petitioners further intimate that Oklahoma's liquor advertising regulations establish a sweeping ban on commercial speech. To the contrary, Oklahoma's regulation of liquor advertising is not applicable to any other legal substance available to the consumer in this State or elsewhere. Narrowly drawn and territorially limited, said regulation does not prohibit the transmission of necessary information to the consumer, such as price and availability of products needed by consumers, as Petitioners contend. It simply restricts the artificial stimulation of consumption of alcoholic beverages by exaggerated displays of the "good life" for the sole commercial benefit of those who serve to profit from that increased usage.

In light of these circumstances, the Tenth Circuit properly considered, as dispositive, this Court's summary affirmation of the appeal in Queensgate, supra. The jurisdictional statement in that case as cited by the Tenth Circuit in Telecasters, supra, 699 F.2d at 494, posed only the issue of whether the regulation therein, forbidding off-premises price advertising, was violative of the First and Fourteenth Amendments. This Court properly dismissed that appeal "for want of a substantial federal question" and a similar disposition is proper in the instant case. Queensgate, supra.

Taken in the context of the other decisions rendered by this Court regarding the interplay of these particular interests here at stake, the Tenth Circuit reached the inevitable conclusion that Oklahoma was exercising the proper State authority under its own police power and that granted by the Twenty-First Amendment. In California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 392 (1972), it has been recognized that the Twenty-First Amendment conferred additional State authority to regulate the sale and consumption of alcoholic beverages. Also important is the State's concomitant power to regulate the circumstances under which liquor may be sold, New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357 (1981), and the extensive discretion authorized as to the means of regulation employed, Ziffrin, Inc. v. Reeves, 308 U.S. 132, 60 S. Ct. 163, 84 L. Ed. 2d 128 (1939).

Oklahoma does not contend that the existence of a Twenty-First Amendment interest in this case preempts all other considerations. Oklahoma does assert that the artificial stimulation of the consumption of alcoholic beverages within its territory is a matter of substantial State concern, and that in the final analysis, any affected federal or constitutional right does not present any justification for further federal intervention. Thus, the matters presented by the Petitioners

for review, though touching upon certain concerns in the federal realm, nonetheless fail to offer federal substantive questions worthy of consideration by the United States Supreme Court. As in Queensgate, supra, this Court should decline to further exercise jursidiction in this matter.

III. THE TENTH CIRCUIT COURT OF APPEALS RESOLVED THE ISSUES IN THE CASE BELOW BY APPLICATION OF THE CORRECT CONSTITUTIONAL BALANCING TEST AND WEIGHED THE PROPER VALUES IN THE CONDUCT OF THAT BALANCING. ACCORDINGLY THIS CASE PRESENTS NO REAL DISPUTE REGARDING CONSTITUTIONAL DOCTRINE, AND, THEREFORE, THE ISSUES PRESENTED ARE NOT OF SUCH WIDE-SPREAD INTEREST AND IMPORTANCE AS TO WARRANT HEARING BY THE SUPREME COURT.

The most striking feature of the Petitioners' First Amendment arguments opposing Oklahoma's ban on liquor advertising is their consistent failure to recognize the "common sense" distinctions between the degree of constitutional protection afforded most forms of expression and the substantially reduced protection available in cases of regulated "commercial speech."

Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, n. 24, 96 S. Ct. 1817, 1830, 48 L. Ed. 2d 346 (1976). Rather, Petitioners' arguments are composed on the basis of a curious amalgam of both commercial and noncommercial speech cases, with the addition of some indirectly posed questions implicating the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq., and certain regulations of the FCC found at 47 C.F.R., pt. 76. Although the Petitioners are apparently loath to say so directly, they suggest that because of these latter federal regulations of cable television commercials, concepts of federal supremacy and preemption would prevent Oklahoma from prohibiting liquor ads on cable television, even if the prohibition were a permissible State regulation under the commercial speech doctrine.

However, all of the Petitioners' contentions are belied by a single, simple truth: The State regulation before us is entitled to special deference because it has been imposed pursuant to Oklahoma's special regulatory power existing under the Twenty-First Amendment, § 2. Because of this fact, combined with Oklahoma's undeniable interest in the promotion of temperance among the people of the State, it is only in very narrow and special circumstances, not present here, that any assertion of a federally protected interest, be it constitutional, statutory or regulatory, could be held to overcome

Oklahoma's right to combat influences tending to increase the use of liquor products, and to abate the abuses and public health problems necessarily attendant upon such increased usage.

Under the precedents of this Court, discussed below, it matters not at all whether the federal interest opposing the State liquor regulations arises under the First Amendment's protection of commercial speech, under the congressional power to regulate commerce, as reflected in FCC regulations, or even under its power to reserve "to Authors . . . the exclusive right to their respective writings . . . ." U.S. Const. Art. I, § 8. In each and every such event, what is required is that the State's regulatory policy, which is entitled to substantial deference, be balanced against the federal regulatory interest or constitutional right at stake. Furthermore, these cases show that in each such instance, regardless of the nature of the federally protected interest opposing the State liquor regulation, any such regulation should be deemed valid if supported by substantial State interests which are directly advanced by the regulation, except where the regulations sweep much broader than the State interest requires.

This balancing methodology represents the standard for review for all commercial speech questions, Central Hudson Gas & Elec. Corp. v. Public Service Comm. of New York,, 447 U.S. 557, 567, 100 S. Ct.

2343, 2351, 65 L. Ed. 2d 341 (1980), as well as for cases involving tension between State liquor regulations and other federally protected regulatory interests. See, California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 113-114, 100 S. Ct. 937, 946-947, 63 L. Ed. 2d 233 (1980) (Sherman Act, 15 U.S.C. §§ 1 et seq., and commerce power); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 2899, n. 25, 69 L. Ed. 2d 800 (1981) (Due Process Clause, U.S. Const., Fourteenth Amendment). The implication of these cases is that so long as Oklahoma's liquor regulation directly serves its interest in suppressing liquor consumption and does not reach further than necessary to serve that substantial and important interest, then it should stand, even though opposed by the federally protected interest in the free flow of commercial information, by the Commerce Clause, by any Commerce Clause regulation or by copyright legislation.

The ability of a State liquor regulation to withstand a challenge that it conflicts with otherwise valid and supreme federal law is clearly reflected in the analytical methodology utilized by this Court in one such recent case. California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., supra. At issue in Midcal was the inherent tension between a State statute requiring wine producers and wholesalers to do

business under fair trade contracts or price schedules, on the one hand, and, on the other, the federal proscription of restraints of trade embodied in the Sherman Antitrust Act, 15 U.S.C. §§ 1 et seq.

In an ordinary case where the State regulation did not implicate the State's special powers under the Twenty-First Amendment, it seems that the federal Commerce Clause interest would in any event supersede the conflicting State regulation. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329, 84 S. Ct. 1293, 1296, 12 L. Ed. 2d 350 (1964). However, where, as here, a State undertakes a regulation on the basis of its Twenty-First Amendment powers, the State regulation should nevertheless be sustained where it serves a substantial State interest in a direct manner.

In Midcal, the State regulation was not upheld, but this was because the Court found no direct relationship between resale price maintenance and either of the State interests: temperance and protection of small business from predatory pricing practices of large retailers. Midcal, supra, 445 U.S. at 113-114, 100 S. Ct. at 947. However, the very fact that the Court even scrutinized the relationship between the State's goals and the effect of its regulations demonstrates that a State liquor regulation serving substantial State interests in a direct manner should be upheld even in the face of a direct conflict with a proper federal law or regulation.

From the substantial deference accorded to State liquor regulations in Midcal and related cases, and especially in light of the factors deemed worthy of balancing by this Court in such cases, it appears that if a State regulation can withstand an attack mounted on the basis of the commercial speech doctrine, and is, additionally, undertaken in pursuit of the State's Twenty-First Amendment interests, then a fortiori, such regulation cannot be overcome by a showing that it conflicted with other federal law. Put more directly, if Oklahoma's ban of liquor advertising can withstand even the force of the First Amendment, then surely it must be proof, as well, against other federal regulations of television commercials.

This reasoning, then, necessarily leads to a consideration of whether the Tenth Circuit Court of Appeals correctly concluded that Oklahoma's ban on liquor advertising exists to serve a substantial interest of the State in a direct manner, without undue restraint. By and large, the opinion below eloquently speaks for itself in this regard.

The Circuit Court certainly reached the only conclusion possible on the question of the substantiality of Oklahoma's interest which is served by the ban on liquor advertising in the State. The promotion of temperance and the discouragement of practices tending to increase the use of intoxicants in the State are

governmental goals which serve a variety of public health and safety interests. See, Ziffrin Inc. v. Reeves, 308 U.S. 132, 138-139, 60 S. Ct. 163, 167, 84 L. Ed. 128 (19[illegible]). It cannot be gainsaid that among these is the State's legitimate and substantial interest in the promotion and preservation of traffic safety, an area where many problems are directly the result of the use and abuse of liquor.

The existence of this traffic safety interest supporting the liquor advertising ban is particularly instructive in this case, because just such a government interest, bolstered only by an asserted interest in esthetics, was held by this Court to justify a total prohibition of all commercial billboard advertising in the case of Metromedia, Inc. v. City of San Diego, supra. Surely, Oklahoma's interest in promoting traffic safety by discouraging increased use of intoxicants is not less substantial than San Diego's similar interest in promoting such safety through the suppression of driver distractions. Of course, traffic safety is only one of the important public health and safety interests furthered by Oklahoma's constitutional and statutory policy of promoting temperance. As the Circuit Court of Appeals correctly recognized, Oklahoma also has other important interests, including promotion of family stability and work force productivity, which are advanced by the State policy of promoting temperance.

The Circuit Court also correctly concluded that a ban on liquor advertising bears a direct relationship to Oklahoma's very substantial interest in discouraging the use of intoxicants. Were it not that this very point has been in litigation for over two years, it would hardly appear open to question that a ban on promotional advertising of liquor directly advances the State's interest in discouraging liquor consumption. The direct relationship is patent, and no one who has ever viewed a wine advertisement on television could possibly conclude that the commercial served any purpose other than promoting increased sales and consumption of the product.

The District Court, of course, found the ties between the State's interests and the means chosen to advance them to be insufficiently direct. But as the Circuit Court observed, the limited scrutiny of commercial speech regulations permitted under the four-step Central Hudson test does not permit Courts to conduct a free ranging search to find if other, even more direct means of furthering State interests might be found. Such scrutiny of legislative wisdom is not consistent with the substantial deference to which a State regulation of commercial speech is entitled. See, Cablecom-General, Inc. v. Crisp, 699 F.2d 490, 500 (10th Cir. 1983).

The final inquiry under the Central Hudson test is whether the challenged regulation reaches further than necessary to serve the State's interest in the promotion of temperance. Since only liquor ads are banned and all such ads promote that which the State clearly has the right to discourage, it appears that the Circuit Court was clearly correct in finding that the regulation did not reach too far. There is, after all, nothing inherently suspect in any complete prohibition of a specific form of advertising providing it directly advances a substantial State interest, even where this could result in the total destruction of an entire advertising industry in the locale. Metromedia, supra, 453 U.S. at 497, 508, 101 S. Ct. at 2887, 2893.

The foregong discussion illustrates that there is nothing in the disposition of this case by the Tenth Circuit which merits further consideration by this Court. The Court of Appeals plainly utilized the correct constitutional tests in assessing Oklahoma's liquor advertising prohibition. The Court balanced the proper factors, and accorded to the State's policies the substantial deference which is appropriate both because this is a case involving regulation of mere commercial speech and because of the State's substantially enhanced regulatory power under the Twenty-First Amendment.

It is the substantial importance of the State's interest in promoting temperance and the direct relationship between that interest and the means chosen to advance it which overcome the federal interest in the free flow of commercial information. Moreover, because the advertising ban also serves the State's special concerns under the Twenty-First Amendment, these same considerations overcome what are argued to be conflicting federal regulations regarding television commercials carried by cable systems. This latter result was also recognized, at least implicitly, by the Court of Appeals.

IV. THE RECORD IN THIS CASE DOES NOT PRESENT A DESIRABLE FRAMEWORK WITHIN WHICH TO WEIGH AND RESOLVE THE CONFLICTS SAID TO EXIST BETWEEN OKLAHOMA'S PROHIBITION OF LIQUOR ADVERTISING AND FEDERAL REGULATIONS OF COMMERCIALS ON CABLE TELEVISION.

One final point is worth noting with regard to the conflict which the Petitioners assert exist between Oklahoma's liquor advertising prohibition and 47 C.F.R. § 76.55(b) and 17 U.S.C. § 111(c)(3). Petitioners assert that these regulations forbid cable operators to delete television commercials from broadcast signals or, in

some instances, compel the carriage of out-of-state signals which might include liquor commercials. The Petitioners apparently believe that the presence of these issues renders this case especially appropriate for further review and consideration by this Court. However, when we examine the record in this case in light of these issues, it becomes apparent that just the opposite is true.

The ruling of the District Court which Oklahoma appealed to the Tenth Circuit Court of Appeals consisted of a summary judgment granting permanent injunctions preventing enforcement of the State law. The factual matters pertinent to copyright and communications regulations by the United States were not very thoroughly developed.

Certainly, some of the factual conclusions drawn by the District Court from the very sparse record appear highly suspect. One especially glaring example illustrates this point. In the District Court's Memorandum Opinion and Order which is found at Appendix G to the Petition for a Writ of Certiorari, at page 41a, the District Court made a specific finding of fact that: "12. There exists no feasible way for Plaintiffs to block out the advertisements." What is remarkable about this finding is that it is so inconsistent with factual findings relied upon by the FCC itself following a commercial deletion and substitution experiment conducted in 1971

by the Commission using the facilities of the Bucks County Cable TV System in Falls Township, Pennsylvania. See, Bucks County Cable TV, Inc., 27 F.C.C.2d 178 (1971).

The Bucks County experiment was undertaken because the FCC, in June, 1970, announced a proposal which would have required cable systems carrying the programming of distant commercial television broadcast stations to delete all commercials contained in such programming, substituting in their place commercials obtained from local broadcasters. See, Cable Television Report and Order, 36 F.C.C.2d 138, 154 (1972). Under the experiment, the Bucks County system carried distant signals from New York City broadcast television stations and the commercials of local broadcasters were:

> "inserted into the signals of the New York stations by means of a manual switching system that is dependent on the skill and efficiency of the persons operating the manual switches who are, in turn, dependent on the visual and audio cues in the program material to indicate when the switching deleting the distant advertising and inserting local advertising should be thrown. Bucks judges that more than 90 percent of the insertions have been made perfectly and that 'a

> manual switching system of commercial substitutions is feasible.'" Id., 36 F.C.C.2d at 156. (Emphasis added)

It would seem apparent that the deletion of the occasional liquor advertisement, without any required substitution of other advertising, presents a much less rigorous technical problem to cable operators than that involved in the comprehensive substitution experiment undertaken in Bucks County. This, in turn, raises real and substantial questions regarding the accuracy of the District Court's blunt finding that commercial deletion by cable systems is unfeasible.

The purpose of this discussion, of course, is not to challenge the factual findings drawn from the record in this case by the District Court. However, these points do serve to raise the question of whether the record in this case presents a proper framework within which the Supreme Court should properly be inclined to hand down a potentially far-reaching decision pertaining to the complex interplay of federal, state, local and commercial interests implicated by the various regulations of advertising on cable television.

This Court has recognized the existence of the many competing considerations presented by cases involving cable television reguations. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401, 88

S. Ct. 2084, 2090, 20 L. Ed. 2d 1176 (1968). If the Supreme Court is to weigh, balance and resolve such competing factors, perhaps it should do so only on the basis of a fully developed record presenting factual information of obvious accuracy and completeness. To do so on the basis of the record in this case, however, presents a real and serious danger that the resulting ruling may be ill-informed and, perhaps, even unworkable.

The safer and sounder course, by far, is for this Court to decline to accept jurisdiction in this case. This has the virtue of permitting further and more complete development of the various competing considerations both in the lower Courts and through further regulatory action. This would be consistent with a recognition that regulatory activity in this field remains in a state of constant flux, due both to the emergence of new technologies and the ebb and flow of the competing interests which are constantly maneuvering for regulatory advantage. See, e.g., the Cable Telecommunications Act of 1983, just passed by the United States Senate, s. 66, Congressional Record, June 14, 1983, p. s8325.

If the cable industry's predicament is indeed as dire as the Petitioners suggest, then it seems inevitable that a case will soon present itself to this Court which fully presents an advertising deletion controversy,

perhaps between a cable operator and the FCC or a copyright owner. Then an exercise of jurisdiction by this Court may be much more appropriate than in the case at bar. For now, however, it is the very presence of these cable television advertising regulation issues which, considering the record here, render this case peculiarly unsuitable for the discretionary exercise of jurisdiction sought by the Petitioners.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

MICHAEL C. TURPEN
Attorney General of Oklahoma

JAMES B. FRANKS *
Assistant Attorney General
Deputy Chief, Civil Division

LYNN BARNETT
Assistant Attorney General

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

Attorneys for Respondent

* Counsel of Record

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